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IN THE

Supreme Court of the United States

October Term, 1969

No. 538

LAVINO SHIPPING COMPANY,

Petitioner

v.

AMERICAN-WEST AFRICAN LINE, INC., D/S A/S DEN NORSKE AFRIKAOG AUSTRALIE LINIE, WILHELMSENS DAMPSKIBSATIESELSKAB, A/S TONSBERG, A/S TANKFART IV, A/S TANKFART, V, A/S TANKFART VI, and Motor Vessel TANA, Her Engines, Boilers, Tackle, Etc.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Lavino Shipping Company, respectfully prays that a Writ of Certiorari may issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on July 1, 1968, affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 17,085, and to review the final judgment of the said Court of Appeals entered on July 22, 1968, in the related appeal docketed therein as No. 17,110.

OPINIONS OF THE COURTS BELOW

The judgment of the District Court for the Eastern District of Pennsylvania, consisting of the Findings, Conclusions, and Discussion of the Trial Judge in admiralty, is reported in 1968 American Maritime Cases at pages 139 to 146, but not in the Federal Supplement, and is annexed hereto at pages 13 to 21 of the Appendix.

The opinion of the Court of Appeals filed on July 1, 1968, is unreported and is annexed hereto as pages 22 to 29 of the Appendix.

The amending opinion of the Court of Appeals filed on July 22, 1968, likewise unreported, is annexed hereto as pages 29 to 31 of the Appendix.

JURISDICTION.

Jurisdiction in the District Court was based upon the admiralty jurisdiction of the federal court in maritime cases. Libel was filed by A. C. Israel Commodity Co., Inc., as consignee of a cargo of bagged cocoa beans shipped from Lagos, Nigeria, to Philadelphia, Pennsylvania, against the ocean carrier Motor Vessel TANA in rem, and against her owners in personam, claiming damages for short delivery. The ocean carrier impleaded the present petitioner, Lavino Shipping Company, for indemnity on the ground that petitioner, as the contracting stevedore at Philadelphia, had failed to account for the shortage.

The trial resulted in an award by the court as trier of fact in admiralty in favor of the consignee and against the ocean carrier for the market value of the missing bags. The Trial Judge also granted the ocean carrier full indemnity against petitioner, and in a subsequent order awarded the ocean carrier counsel fees and expenses allocable to defending the claim of the consignee. Due to the

lapse of time between these separate judgments, petitioner was required to take two appeals, which were later consolidated for purposes of briefing and argument.

The Court of Appeals dismissed petitioner's appeal from the award of indemnity (No. 17,085) but remanded the portion of the appeal pertaining to the award of counsel fees and expenses (No. 17,110) for the purpose of reviewing the allocation. After petitioner and respondents filed Petitions for Rehearing reminding the court that the amount of the allocation, provided such expenses were recoverable under the circumstances, had been agreed upon by counsel, the amending opinion affirmed both judgments.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

QUESTION PRESENTED.

Does Section 1303(4) of the *Carriage of Goods by Sea Act*, 46 U. S. C. A., Sec. 1303(4), which provides that as between the ocean carrier and the shipper or consignee the carrier's bill of lading shall be prima facie evidence of condition and quantity of the cargo designated therein, constitute prima facie evidence of quantity against the stevedore company which discharges the cargo, in an action by the ocean carrier to recover indemnity for alleged short delivery to the consignee?

STATUTORY PROVISIONS INVOLVED.

The statutory provision directly involved herein is Section 1303, Subsection (4), of the *Carriage of Goods by Sea Act*, 49 Stat. 1208, 46 U. S. C. A. Section 1303(4), which must be read in the context of Subsections (3) and (5). These provisions are set forth verbatim at pages 11 and 12 of the Appendix.

STATEMENT OF THE CASE.

Motor Vessel TANA loaded a quantity of bagged cocoa beans at Lagos, Nigeria, in May, 1961, designated for various consignees in Philadelphia, Pennsylvania. According to the quantities shown on the bills of lading 80,000 bags were consigned to A. C. Israel Commodity Co., Inc.

The ship's cargo manifest and cargo stowage plan for the voyage likewise indicated that 80,000 bags were consigned to Israel, but as the Trial Judge found after hearing all of the testimony "There is no evidence that the vessel made its own count of the bags at Lagos." (Findings of Fact No. 6, *infra,* page 14.) Since the ship made no count of its own, it necessarily follows that the manifest and the stowage plans depended entirely, like the bill of lading, on the shipper's count. There was no evidence to indicate when, where, by whom, or under what conditions these quantities were ascertained.

The ocean carrier appointed petitioner as its agent to handle the business of the vessel upon arrival at Philadelphia on June 20, 1961. Petitioner, which also furnishes stevedoring services, discharged the cargo. The bags were transferred to an adjacent pier shed which was fully enclosed, placed under constant guard (Findings of Fact No. 18, *infra,* page 16), and delivered to consignees at the pier on written order. A portion of Israel's shipment was delivered to customers on order, and except for an instance when five bags were delivered in excess of the amount covered by the order there were no delivery errors.

In the course of unloading the cargo, petitioner's checkers tallied the bags in each hold. Petitioner's tally records introduced at the trial disclosed considerable discrepancy between the quantities shown by the ship's cargo stowage plan and the quantities actually stowed in several holds and

compartments. The final tally showed that the ship had carried 2,309 bags less than the total shown by the bills of lading, manifest, and cargo stowage plan. (Findings of Fact No. 15, *infra,* pages 15 and 16.) There was testimony that several other ships from Nigeria had reported similar shortages. (Findings of Fact No. 16, *infra,* page 16.)

By July 2, 1961, all bags designated for other consignees had been delivered from the pier, leaving 43,800 bags of Israel's shipment according to the quantities shown on the ship's documents. When petitioner's checkers tallied this lot on transfer to railroad cars, they counted a shortage of 341 bags. When the shipment was unloaded and tallied at the warehouse in Philadelphia, the shortage was said to be 473 bags out of 43,800.

The Trial Judge concluded that petitioner must have obtained possession of 80,000 Israel bags and that, having failed to account for delivery of a lesser number, petitioner was responsible for the shortage. This conclusion was predicated on the erroneous assumption that the *Carriage of Goods by Sea Act* made bill of lading quantities prima facie evidence against the stevedore company. The award of indemnity depended on this misinterpretation of the federal statute, inasmuch as the Trial Judge found that "There was no evidence other than the documents and the admission of the ship that the vessel had received the acknowledged amount." (Findings of Fact No. 6, *infra,* page 14.)

Neither of the two opinions filed by the appellate court made any reference to this fundamental error of law although it was emphasized in petitioner's brief, oral argument, and petition for rehearing.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision Conflicts With the Applicable Decisions of This Court.

By affirming the judgments of the District Court, the Court below has sanctioned the extension of the *Carriage of Goods by Sea Act*, Section 1303(4), to give an ocean bill of lading prima facie effect against a stevedore company. The Trial Judge left no doubt that the indemnity award was based on the statutory presumption in substitution for customary proof that the indemnitee shipowner had actually received 80,000 Israel bags at Lagos, and had delivered 80,000 such bags into the possession of the stevedore company at Philadelphia.

Under "Discussion" the Trial Judge starts with the following statement of law (*infra*, page 19):

> "There is no dispute as to the applicable essential principles of law controlling this litigation. First, the bills of lading are prima facie proof of their content which however can be rebutted by competent evidence. * * *."

At another point (*infra*, page 20), the Trial Judge lists his reasons for blaming the shortage on petitioner, citing first of all "the prima facie effect of the bills of lading." In Conclusions of Law No. 3, the Trial Judge states (*infra*, page 21):

> "3. The bills of lading are prima facie evidence of the condition and quantity of the cargo. 46 U. S. C. A. Sec. 1303(3). Lavino has not rebutted their prima facie effect."

The court erred in citing Sec. 1303(3) instead of Sec. 1303(4), but his misapplication of the latter section against

the stevedore company was reversible error and should have been corrected by the appellate court.

Section 1303(4) provides that the ship's bill of lading shall be prima facie evidence of condition and quantity of the cargo designated therein, but the Act regulates the responsibility of the *carrier* to the *shipper or cargo owner.* It does not regulate the responsibilities of the ship's agent or stevedore company. A stevedore or agent is neither bound by nor entitled to the benefit of the bill of lading to which he is not a party.

This principle was made abundantly clear by this Court in *Herd & Co. v. Krawill Machinery Corp.*, 359 U. S. 297, 1959 A. M. C. 879 (1959), at page 301:

> "The Act is clearly phrased. It defines the term 'carrier' to include 'the owner or the charterer who enters into a contract of carriage with the shipper.' Sec. 1301(a). It imposes particularized duties and obligations upon, and grants stated immunities to, the 'carrier.' Secs. 1302, 1303, 1304. Respecting limitation of the amount of liability for loss of or damage to goods, it says that 'neither the carrier nor the ship' shall be liable for more than $500 per package. Sec. 1304(5). It makes no reference whatever to stevedores or agents."

This decision overruled a line of cases in which the federal courts had held that the stevedore or agent was entitled to the benefit of time or damage limitations granted to the ocean carrier under the Act. Such had been the holding in *A. M. Collins & Co. v. Panama R. Co.*, 197 F. 2d 893, 896 (5th Cir., 1952). In *Herd, supra,* at page 305, this Court said:

> "The holding of the majority in *Collins* that the liability of a negligent agent of a carrier, though not limited by any statute or contract, is nevertheless

limited by and to the extent of the limitation granted by the shipper to the carrier in the bill of lading, simply because the agent is performing some part of the work thereby undertaken by the carrier, is clearly contrary to the above-cited decisions of this court."

This Court then quoted with approval the following English law as stated in *Wilson v. Darling Island Stevedoring & Lighterage Co., Ltd.*, (1956) 1 Ll. L. Rep. 346 (1956), Argus Law Rep. 311, 29 Austral. L. J. 740:

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. * * *."

The award of indemnity in the present case, based on substitution of Section 1303(4) for proper proof that petitioner actually received the allegedly missing bags, is in direct conflict with *Herd, supra,* and the decisions there cited.

II. This Decision Has Sanctioned the Erroneous Interpretation of a Federal Statute Which Should Be Corrected by This Court.

The affirmance of the judgments without any reference to the *Carriage of Goods by Sea Act* amounts to appellate approval of the fundamental error of law committed by the District Court. As it stands, the decision of the appellate court is authority for extending the prima facie evidence provisions of Section 1303(4) to the petitioner, who was serving as both agent and stevedore for the ocean carrier.

It is unjust and inequitable to impose this burden on ship's agents or stevedore companies, and as this Court decided in *Herd, supra,* the statute was not intended to apply to them. The practical effect of such an extension is to shift the burden of proof from the ocean carrier, where it belongs, to the stevedore company at the unloading port.

It is the carrier which is in the most favorable position to prevent mistakes in recording the quantity loaded, by making its own count when the cargo is brought on board the vessel. The burden of resolving disputes relating to loading records should rest on the carrier, which is the rationale of Section 1303(4) as it relates to shippers and cargo owners. This burden should not be shifted to a stevedore company in a distant port when the ocean carrier seeks indemnity for short delivery of cargo which may never have been loaded.

Misapplying the prima facie evidence provision of the statute leads to situations like the present, where the ocean carrier made no discernible effort to determine the accuracy of the shipper's loading count at Lagos, but turned its entire effort to recovering indemnity from the unloading stevedore. In this case the result was at most a presumption, since no negligence was shown on the part of petitioner in discharging, storing, or distributing the bags of cocoa beans.

The present decision imposes an unjust and intolerable economic burden on contract stevedoring in every American port. It virtually makes the stevedore an insurer of the carrier's obligation under its bill of lading. Contract stevedores throughout the nation are already laboring under severe financial difficulties without this added burden of responsibility.

The Court below invoked *McAllister v. U. S.,* 348 U. S. 19, 20 (1954), in summarily sustaining the conclusion of the

Trial Judge that "the bags were received but were lost by Lavino." (*infra,* page 23). The *McAllister* rule clearly applies to reliance on testimony of witnesses whom the Trial Judge saw and heard. No witnesses in this case testified that 80,000 Israel bags were received by Lavino and that some of them were lost. On the contrary, the only testimony relating to the quantity discharged showed that the ship's documents were incorrect. The *McAllister* rule does not apply to misinterpretation of federal law or statutes, which may be—and in this instance should have been—reviewed on appeal.

CONCLUSION.

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

THOMAS F. MOUNT,
HARRISON G. KILDARE,
Counsel for Petitioner.

Dated: Philadelphia, Pennsylvania

APPENDIX.

EXCERPT FROM CARRIAGE OF GOODS BY SEA ACT.

Act of April 16, 1936, c. 229, Sec. 3, 49 Stat. 1208, 46 U.S.C.A., Secs. 1303(3), (4) and (5).

Contents of Bill.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods; *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as Prima Facie Evidence.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein de-

scribed in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81-124 of Title 49.

Guaranty of Statements.

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW.

WOOD, *J.* October 31, 1967.

This is an action[1] by the owner of goods to recover damages from the carrier for failure to account for the quantities acknowledged on the bills of lading issued on loading.[2] The carrier impleaded the stevedore who discharged, cared for and eventually consigned the goods after docking, on the theory that all the cargo was delivered but part of it was somehow lost while in control of impleaded respondent. The carrier is suing to recover the amount of any judgment entered in favor of libellant herein plus attorney's fees and costs paid in defending the suit.[3] After a trial without a jury, we make the following:

FINDINGS OF FACT.

1. Libellant, A. C. Israel Commodity Co., Inc., a corporation existing under the laws of the State of New York, with its principal office in New York City, buys and imports edible commodities, including cocoa beans for resale.

2. Respondent American-West African Lines, a corporation doing business in the eastern district of Pennsylvania, operates merchant vessels as carriers of cargo by sea.

3. Respondents, D/S A/S DEN NORSKE AFRIKAOG AUSTRALIE LINIE and WILHELMSENS DAMPSKIBSATIESELSKAB and A/S TONSBERG and A/S TANKFART I and A/S TANKFART IV

1. Libellant has elected to prosecute the Admiralty action. The claim against Reading Company was dismissed with the agreement of counsel for libellant.

2. All claims for slackage have been abandoned.

3. Further action will be taken by the Court if counsel cannot agree on the legal or factual aspects of this issue.

and A/S TANKART V and A/S TANKFART VI, foreign corporations, owned and operated the M/V TANA which was a merchant vessel operating as a carrier of cargo by sea between the ports of Lagos, Nigeria and Philadelphia, Pennsylvania.

4. Impleaded respondent Lavino Shipping Co. is a Pennsylvania corporation with its principal office and place of business in Philadelphia and was engaged by the carrier to act as its agent, stevedore and terminal operator at Pier 78 South in Philadelphia.[4]

5. The carrier admits that on or about May 21, 1961, at Lagos, Nigeria, it received a shipment of 48,000 bags of cocoa beans consigned to plaintiff. In addition, other cargo was delivered to the ship for transport, including 32,000 other bags of cocoa beans. The total cargo destined for transport to Philadelphia was 5,058 tons and included lumber and goatskins.

6. Clean on board bills of lading were issued by the ocean carrier in the ordinary course of business at the time of loading the goods for transportation aboard M/V TANA, acknowledging receipt of 80,000 bags of cocoa beans. The ship's stowage plan and the ship's manifest also indicated that 80,000 bags were aboard ship. There is no evidence that the vessel made its own count of the bags at Lagos. There was no evidence other than the documents and the admission of the ship that the vessel had received the acknowledged amount.

7. There is no evidence that any cargo was lost during the ocean voyage or anywhere between Lagos and Philadelphia.

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4. Libellant will be referred to as "shipper"; respondents will be referred to as "carrier"; and impleaded respondent will be referred to as "stevedore".

8. Of the quantity of beans consigned to plaintiff, 32,000 bags were main crop Lagos and 16,000 were light crop Lagos.

9. On June 21, 1961, the M/V TANA arrived at Pier 78 South in Philadelphia. Lavino Shipping Company, which leased and controlled Pier 78 South was designated as agent for the shipowner and in addition to its other duties discharged, stored and consigned the ship's cargo.

10. Lavino from the time the ship docked was in control of the cargo.

11. All of the cargo was completely discharged from the vessel between the arrival date and June 20, 1961. Lavino's records indicate that 5,059 tons of cargo were discharged from the ship.

12. At the time of discharge of the cargo from the ship to Pier 78, there were other bags of cocoa beans on the pier with the same mark as those discharged from the M/V TANA. Whatever bags were there were probably palletized in one spot of the pier.

13. Lavino was under an obligation to provide and use only safe, sound and seaworthy equipment and to refrain from any act which would damage the cargo and to conduct the stevedoring operation in a careful, proper and efficient manner and further properly to account for all bags of cargo being discharged from the carrier and delivered to the consignees or their agents.

14. The SS AFRICAN DAWN discharged bags of cocoa beans with the same mark as those consigned to Libellant while 1,459 bags from the M/V TANA's cargo were still on the pier.

15. Lavino hired checkers to count all bags of cocoa beans as they were discharged from the ship onto the pier.

This was the first of three tallies made. According to those making the tallies, the outturn of the five holds of the M/V TANA did not correspond with the ship's stowage plan or manifest. This first count showed a total shortage of 1,962 bags out of 80,000 to be discharged. The checkers computed that number 4 hold alone lacked 2,309 bags which the ship's stowage plan called for. They determined that the other holds had overages.

16. There was some testimony that several other ships from Nigeria had reported similar shortages in their cargo.

17. Between June 26 and July 10, Lavino executed delivery instructions given by or on behalf of libellant for 4,200 bags of main crop cocoa beans.

18. After the bags had been discharged from the M/V TANA, they were kept in Lavino's custody until delivery as a warehouseman inside the pier shed under the aegis of three shifts of watchmen for 24 hours a day. No evidence was shown of theft.

19. The remainder of plaintiff's cargo assumed to be 43,800 bags was placed into Reading Company railcars by Lavino, for delivery to Terminal Warehouse Company in Philadelphia, between July 2 and July 10, 1961.

20. Lavino through its checkers counted the number of bags as they were placed into the cars. Their count showed a shortage of 341 bags in the Israel cargo. The railroad made no independent count of the bags but accepted the tallies made by Lavino.

21. Lavino's delivery book regarding cargo from the M/V TÁNA (Exhibit P-10) shows that all 80,000 bags of cocoa beans were delivered but 341 bags.

22. After the railroad cars had been loaded, each car was sealed, so that it could not be opened, and the contents

removed without breakage of the seal. The checkers at Terminal Warehouse, a subsidiary of Lavino, after the seals had been broken and while the cargo was being unloaded computed that the freight cars did not contain 473 bags of the supposed shipment of 43,800 or 132 more of a deficiency of bags than the checkers at the Pier had computed.

23. There were no shortages noted as to those rail cars whose seals were not in order. There were found to be numerous shortages and overages between the stevedore's tally records showing loadings into the cars and the warehouse tally records showing the discharge from the cars. Each car was found to have the same numbered seal on it as when it left the pier. The Reading was in no way responsible for any of the losses.

24. Lavino investigated the shortages at the direction of counsel for the ocean carrier. In addition to other checks, it requested each of the consignees of the 4,200 bags of cocoa beans to verify the quantity and mark of the bags received by them, to ascertain if there were overages. All replied but only one consignee admitted an overage and that was one of five bags. The consignee was billed for the additional bags.

25. The checkers employed to tally the amount of cargo from ship to pier were casual union employees disinterested in Lavino's operations and not very reliable. Those employed to tally the amount of cargo from dock to railcars were more reliable. The checkers at Terminal Warehouse were regular employees.

26. The first check showed a shortage of 1,962 bags out of 80,000; the second check showed a shortage of 341 bags; the third check showed a shortage of 473 bags and a discrepancy in many railcars between what the second

checkers tallied and the third checkers found. Lavino is responsible for at least the first two checks. We place more reliance on the last check because of the fact that each car was checked on an individual basis against tallies already made and many inaccuracies were found and because of the regular employment of the checkers. Terminal Warehouse consigned the bags delivered to various buyers from Israel. Their records (P-6) show the amount delivered and the amount received from the railroad cars. These records show the shortages and are probably much more accurate than the tallies made by Lavino.

27. Each bag of beans contained a mark identifying the quality of the beans and the port of loading but contained nothing to indicate to whom it was consigned. The bags of one owner were not separated from those of another in the holds of the ship. When the 80,000 bags of cocoa beans were discharged from the ship, the stevedore merely apportioned the lot according to the respective bills of lading. The bills of lading indicated that libellant owned 32,000 bags of main crop, NCMB Nigeria and 16,000 bags of light corp, NCMB Nigeria. Of these, 4,200 bags of main crop were shown to have been delivered to various consignees.

28. The warehouse failed to receive 433 bags of main crop and 40 bags of light crop which should have been delivered. It was shown that 5 bags were delivered to a consignee over its consignment and which were probably main crop since this was the content of its entire proper delivery. Accordingly, the ship has failed to account for 428 bags of main crop and 40 bags of light crop.

29. Lavino in turn failed to account to the carrier for the disappearance of the same bags which we find were loaded on ship in Lagos and which were delivered to Philadelphia.

30. The bags each contained an average of 140 pounds of beans. The final delivery of libellant's cargo was made on July 10, 1961, to Terminal Warehouse when the market value for main crop Lagos cocoa beans was 21¾ cents per pound and the market value for light crop Lagos cocoa beans was 20⅞ cents per pound. The market value of the 428 main crop bags was $13,032.60; the market value of the 40 light crop bags was $1,169.00.

DISCUSSION.

There is no dispute as to the applicable essential principles of law controlling this litigation. First, the bills of lading are prima facie proof of their content which however can be rebutted by competent evidence. The respondents are liable on a bailment theory for failure to deliver all of the shipper's cargo if they have no legal defense. Finally, the impleaded respondent is liable over to the respondents if it cannot properly account for the cargo discharged at the pier. See *Panama Canal Co. v. Stockard & Co.*, 391 Pa. 374 (1958). The main problem here is on whom the loss must fall.

First, it is clear that the carrier is liable to the libellant. It admitted receipt of the lost cargo but could offer no explanation of the loss except to blame its agent, Lavino, for whose defaults it is liable. The carrier therefore seeks indemnity from Lavino, who attempts to exonerate itself by arguing that all the evidence tends to show that the vessel never received the lost goods and that Lavino has accounted for all the cargo that was discharged at the pier.

The stevedore tries to prove this by arguing that its checkers counting the number of bags as they were being discharged in Philadelphia found a substantial shortage and that the cubic capacity of the hold number four could

not have contained the number of bags provided for on the ship's manifest. It points also to the testimony that similar shortages had occurred in other ships from Nigeria. The argument falters however because we can give no weight at all to the checks made by Lavino's employees. There were too many discrepancies and too many possibilities of error on its part. Further, the testimony as to other shortages does not prove that this ship had a shortage. First, we do not know the circumstances behind the other shortages nor secondly do we know the quantities or the goods which were short.

Despite Lavino's protestations, we hold that it is liable to the ship for any damages which it must pay to the libellant. All of the following facts point to some mishandling of the cargo on the part of Lavino's employees: the prima facie effect of the bills of lading, the substantial variances in the three checks, the variances found in many cars between what was supposedly in them and what they actually contained, the delivery of five extra bags to one consignee, which was known only because of the consignee's admissions, the presence of similar cargo although localized on the pier during the unloading of the M/V TANA, the arrival of another ship containing similar cargo and finally the weighing of the cargo which showed a greater tonnage than that loaded onto the vessel in Lagos.

While no one could ascertain how the missing bags had been lost, it is probable that a larger quantity was delivered to the first consignee than had been ordered and/or that there had been some thefts from the pier or that somehow the M/V TANA's cargo had become confused with some other cargo. Whatever happened, we believe that the bags were received but were lost by Lavino.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over the parties and of the subject matter.

2. Libellant-plaintiff is the proper party to bring this action, since it was the owner of the bags of cocoa beans at all relevant times.

3. The bills of lading are prima facie evidence of the condition and quantity of the cargo. 46 U. S. C. A. § 1303(3). Lavino has not rebutted their prima facie effect.

4. Lavino was the agent of respondent in all facets of unloading and consignment. Accordingly, respondent is liable to libellant for the failure of Lavino to account for the entire quantity of cocoa beans.

5. Respondent is liable to libellant for failure to deliver 468 bags of cocoa beans belonging to libellant.

6. Lavino in turn is liable to respondent for any damages it is required to pay to libellant for its failure adequately to account for the losses of the cocoa beans.

7. The award of interest is in the discretion of the Court. Libellant is entitled to recover interest at the legal rate from the date of final delivery to Terminal Warehouse, July 10, 1961 to the present on the amount of the damages.

8. The lost goods will be evaluated as of the time of final delivery to Terminal Warehouse since then they would have been available to libellant for resale with the remaining goods. Libellant is entitled to recover $14,201.60 plus the legal rate of interest from July 10, 1961 to the present.

9. Counsel will submit order within ten days.

HAROLD K. WOOD, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17085 and 17110

A. C. ISRAEL COMMODITY CO., INC.

v.

AMERICAN-WEST AFRICAN LINE, INC.,
D/S A/S DEN NORSKE AFRIKA-OG
AUSTRAILIELINIE,
WILHELMSENS DAMPSKIBSAKTIESELSKAB,
A/S TONSBERG, A/S TANKFART I,
A/S TANKFART IV, A/S TANKFART V,
A/S TANKFART VI, AND MV TANA, HER ENGINES,
BOILERS, TACKLE, APPAREL, ETC.,
Appellees,

v.

LAVINO SHIPPING COMPANY,
(IMPLEADED RESPONDENT),
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued May 10, 1968

Before McLAUGHLIN, KALODNER and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT

(Filed July 1, 1968)

VAN DUSEN, *Circuit Judge.*

This admiralty action by an importer and owner for missing bags of cocoa beans consigned to it against the carrier (one of appellees—hereinafter called "appellee") was tried to the court. On the basis of Findings of Fact, Conclusions of Law and a "Discussion," judgment was entered in favor of the owner against the carrier and in favor of the carrier against the stevedore (appellant), as indemnitor, for the full amount of the carrier's liability to the owner.[1] The appeal in No. 17085 is taken from this November 9, 1967, District Court judgment against the appellant.

After a careful review of the record, we can find no basis for holding that the Findings and Conclusions of the trial judge that "the bags were received but were lost by Lavino" were clearly erroneous.[2] See *McAllister v. United States*, 348 U. S. 19, 20 (1954). The contention that appellee waived or abandoned available defenses to the owner's claim is not supported by this record.[3] For the

1. See *David Crystal, Inc. v. Cunard Steam-ship Co.*, 339 F. 2d 295, 299 (2nd Cir. 1964), cert. den. 380 U. S. 976 (1965), holding that a stevedoring company is liable to indemnify a carrier who employs it where such company is responsible for the loss of the cargo. Appellant conceded its obligation "to properly account for all bags of cargo being discharged from the vessel and delivered to the consignees or their agents."

2. The trial judge made clear that he did not accept the testimony of several of appellant's employees.

3. For example, the record shows that appellee's Answer to Requests for Admission denied as much of such Requests as the evidence indicates was justified. In appellee's pre-trial memorandum, it stated: "What happened to the bags thereafter [after unloading] must be explained by Lavino and/or Reading Company," that it might be "responsible" for some of the claims for slackage and that there could not be any liability for more than 341 bags. It is noted that in paragraph 7 of its Answer to the Petition to Implead, appellant alleged:

foregoing reasons, the judgment of November 9, 1967, appealed from in No. 17085, will be affirmed.

After the above-mentioned judgment of November 9, 1967, had been entered by the District Court and a notice of appeal from that judgment had been filed, the trial judge heard argument on appellee's claim for counsel fees and expenses. During this argument, appellant conceded that $2,134.41 represented a fair amount for attorney's fees and costs of appellee in the District Court. The trial judge entered, on December 21, 1967, a supplemental judgment "of $2,134.41 as indemnity for attorney's fees and costs in defending libellant's claim." A timely appeal was filed by appellant from this supplemental judgment, which is docketed in this court as No. 17110. Appellant challenges this judgment on the grounds that appellee "can recover only those fees or expenses allocated to the defense of the primary claim against it" and that appellee offered no defense to the primary claim. The record requires the rejection of the contention that appellee did not make any defense to the primary claim. See, for example, footnote 3, *supra*. Also, the record shows that during the trial appellee called two witnesses, cross-examined at least two of the owner's witnesses, and offered at least six exhibits in evidence after the owner had offered in evidence the

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"It further avers that any damage or short delivery established by the consignees herein was caused by inadequate containers and/or improper stowage on the vessel and/or errors in accounting by respondents and/or negligent handling of the shipment by persons other than the impleaded respondent."

thereby raising personal defenses against the indemnitee but not demanding proof of the number of bags loaded in Africa, which it now claims appellee should have produced. Similarly, no affirmative defenses based on clauses in the bill of lading were included in appellant's Answer to the Libel, so that no evidence on the possible application of Clause 15 was produced at the trial. Also, see 46 U. S. C. § 190 and *David Crystal, Inc. v. Cunard Steam-ship Co., supra*, at 297-300; *Caterpillar Overseas S. A. v. S. S. Expeditor*, 318 F. 2d 720 (2nd Cir.), cert. den. 375 U. S. 942 (1963).

concededly admissible bills of lading evidencing receipt on the ship of the missing bags in Africa. Although some of such trial activity of appellee was directed to showing that appellant was responsible for the missing bags, appellee's counsel objected to evidence offered by libellant and attempted to keep the evidence of the number of missing bags as low as feasible (see, for example, Exhibits D-1 to D-3). Libellant claimed 491 bags lost and slackage of approximately 8500 pounds, but the trial resulted in a finding of 468 bags lost. 127 pages of the trial transcript concerned the principal action. Appellee's evidence, some of which was in defense of the principal action as stated above, covers 33 pages of the transcript and appellant's evidence is contained on 37 such pages.

The general rule, as usually stated, is that counsel fees and expenses incurred by an indemnitee in defense of a law suit can be recovered from the indemnitor if the defense is against the liability indemnified against or if the fees and expenses arise as part of the damages for which the indemnity is granted. 27 Am. Jur., Indemnity, § 27; 42 C. J. S., Indemnity, §§ 13d and 24; *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F. 2d 673, 674 (3rd Cir. 1964), cert. den. 382 U. S. 812 (1965); *United States Lines Company v. E. J. Lavino & Company*, 198 F. Supp. 483, 488 (E. D. Pa. 1961), aff'd. *sub nom. Rogers v. United States Lines Company*, 303 F. 2d 295 (3rd Cir.), cert. den. 371 U. S. 876 (1962); *Frommeyer v. L. & R. Construction Co.*, 261 F. 2d 879, 881 (3rd Cir. 1958). But a distinction is drawn within this general rule when the counsel fees and expenses sought relate to both an indemnitee's activities in defense of the liability asserted by the plaintiff and to an indemnitee's efforts to assert the right to indemnification against his indemnitor. *Frommeyer v. L. & R. Construction Co., supra*, at 881; *Calderone*

v. Naviera Vacuba S/A, 328 F. 2d 578 (2nd Cir. 1964); *Williams v. Pennsylvania Railroad Company*, 267 F. Supp. 495 (E. D. N. Y. 1967); *General Electric Company v. Mason & Dixon Lines, Inc.*, 186 F. Supp. 761 (W. D. Va. 1960); *Holley v. The Manfred Stansfield*, 186 F. Supp. 805, 811 (E. D. Va. 1960).[4]

The federal maritime cases consistently apply the foregoing rule to grant recovery to the indemnitee-carrier against the indemnitor-stevedoring company for counsel fees and expenses, at least insofar as they are incident to its defense of the principal action. E.g., *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc., supra; Shannon v. United States*, 235 F. 2d 457 (2nd Cir. 1956); *DeGioia v. United States Lines Company*, 304 F. 2d 421 (2nd Cir. 1962); *Nicroli v. Den Norske Afrika-og Australielinie, Etc.*, 332 F. 2d 651 (2nd Cir. 1964); *Massa v. C. A. Venezuelan Navigacion*, 332 F. 2d 779 (2nd Cir.), cert. den. 379 U. S. 914 (1964).

The admiralty cases make clear that the carrier-indemnitee is entitled to his expenses, including counsel fees, in defending the principal action particularly where an impleaded respondent invokes personal defenses against him, challenging his right of indemnity as was done in this case.

See, for example, *Crystal* case, *supra*, at 300. Since, as noted above, at least some of appellee's legal activities were in defense of the primary claim against it and were not directed against, but for the benefit of, the appellant-indemnitor, appellee is entitled to the award of some of its counsel fees and expenses, at the least.

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4. *David Crystal, Inc. v. Cunard Steam-ship Co., supra*, at 300, cited by both parties to this appeal, does not discuss the problem of recovery for legal fees which arguably are incurred for legal activities against the indemnitor on the issue of indemnity. Although a substantial issue in *Crystal* concerned interpreting the contract of indemnity, the recovery was for "attorney's fees and disbursements incurred in defendant against . . . [the plaintiff's] claim."

Although the judge allowed the stipulated amount of counsel fee and expenses "as indemnity . . . in defending libellant's claim," the record shows that appellant conceded only that such $2,134.41 was "a fair amount for attorneys' fees and costs in the District Court." Under the above cited cases, it is clear that appellee may recover all, or at least the part, of such sum as is allocable to defense of the principal action in the District Court. With regard to the rest of the legal fees and costs, however, whether the right to indemnification arises in this case under federal admiralty law or state law of bailment or agency,[5] our decision in *Frommeyer v. L. & R. Construction Co., supra,* and the other cases cited above convince us that the issue of counsel fees and expenses should be returned to the District Court for a decision on what portion of the total amount claimed represents legal activities of appellee that do not constitute efforts to establish the right of indemnification from appellant. Drawing such a line is admittedly difficult on the facts in this case and in light of the fact that, as a defense to the "primary" claim of the libellant, both appellant and appellee sought to place sole blame on each other. But no policy consideration of admiralty law[6] or otherwise

5. The opinion of the District Court is unclear as to the precise legal basis for appellee's right to indemnification. Finding of Fact 13 would seem to find an implied contract of indemnification under the admiralty theory of *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124 (1956), whereas the citation of *Panama Canal Company v. Stockard & Company*, 391 Pa. 374, 137 A. 2d 793 (1958) (the only authority cited by the District Court), would suggest that the contract of indemnity was implied under a bailment theory of appellant's liability. Nothing of record indicates the existence of a written contract for indemnity between appellee and appellant.

6. The Supreme Court decisions in *Ryan v. Pan-Atlantic Corp., supra; Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563 (1958); and especially *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959), may show a general policy of expanding the recovery of an owner-carrier over against the stevedoring company, but this extension arises in the context of providing recovery for injured seamen or longshoremen who have sued one of these parties. In a context in-

seems to militate against asking the District Court to make this difficult factual determination[7] or persuades us that, despite the general rules of indemnity, one party or the other should bear all of the disputed costs and fees on a record such as that in this case.

Accordingly, the judgment appealed from in No. 17110 will be vacated and the case will be remanded for disposition by the District Court in light of this opinion.

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volving the carrier and stevedore only, such as that present in this case; no policy argues for favoring one or the other and an apportionment of counsel fees and costs according to the general rules of indemnity appears to have no consequence of any degree on the protection of longshoremen or seamen.

7. This burden was undertaken by the District Court in the *General Electric* and *Holley* cases cited above at page 5. Cf. *Massa case, supra,* at 782; *Nicroli case, supra,* at 656.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 17085 AND 17110

A. C. ISRAEL COMMODITY CO., INC.

v.

AMERICAN-WEST AFRICAN LINE, INC., D/S A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, AND MV TANA, HER ENGINES, BOILERS, TACKLE, APPAREL, ETC.

v.

LAVINO SHIPPING COMPANY,
(IMPLEADED RESPONDENT),

Appellant

ORDER AMENDING OPINION AND VACATING JUDGMENT.

Present: MCLAUGHLIN, KALODNER and VAN DUSEN, *Circuit Judges.*

And now after consideration of the concession in Appellant's petition for rehearing that "the only issue . . . was . . . whether the ocean carrier had exerted any genuine effort to defend the initial suit" as opposed to the

contention in Appellant's brief at page 16 that "the carrier . . . cannot recover . . . fees or expenses for prosecuting the claim for indemnity [and] . . . can recover only those fees or expenses allocated to the defense of the primary claim against it",

It is ORDERED that

(A) The opinion filed July 1, 1968 be amended as follows:

(1) Delate the first full sentence on page 4 thereof, begining "But a distinction . . ." to and including the deletion of footnote 4; and

(2) Substitute the following for all remaining language of the opinion, beginning with the second paragraph on page 5 thereof:

> "See, for example, Crystal case, supra, at 300. Since, as noted above, at least some of appellee's legal activities were in defense of the primary claim against it and were not directed against, but for the benefit of, the appellant-indemnitor, appellee is entitled to the award of its counsel fees and expenses incurred in such defense of the primary claim. Since counsel for both parties have, by their petitions for rehearing, made it clear of record that the above mentioned concessions as to the amount of counsel fees ($2134.40) included solely those fees allocable to appellee's defense of the primary claim, the judgment appealed from in No. 17110, as well as that appealed in No. 17085, will be affirmed."

and

(B) The judgment of July 1, 1968, in No. 17110, entered in accordance with the opinion filed on that date, be set aside and vacated.

By THE COURT,

FRANCIS L. VAN DUSEN,
Circuit Judge.

Dated: July 22, 1968.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 538.

LAVINO SHIPPING COMPANY,

Petitioner

v.

AMERICAN-WEST AFRICAN LINE, INC., D/S A/S DEN NORSKE AFRIKAOG AUSTRALIE LINIE, WILHELMSENS DAMPSKIBSATIESELSKAB, A/S TONSBERG, A/S TANKFART IV, A/S TANKFART, V, A/S TANKFART VI, and Motor Vessel TANA, Her Engines, Boilers, Tackle, Etc.,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 538.

LAVINO SHIPPING COMPANY,

Petitioner

v.

AMERICAN-WEST AFRICAN LINE, INC., D/S A/S DEN NORSKE AFRIKAOG AUSTRALIE LINIE, WILHELMSENS DAMPSKIBSATIESELSKAB, A/S TONSBERG, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, AND MOTOR VESSEL TANA, HER ENGINES, BOILERS, TACKLE, ETC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

Where other facts support petitioner's responsibility for this loss, where there is an absence of a conflict of decisions, and where petitioner has failed to demonstrate that the question presented is of great importance to the public as distinguished from the parties, has not the petitioner failed to sustain its burden of establishing a basis upon which to grant certiorari?

REASONS FOR DENYING WRIT.

Petitioner's argument is without foundation. First and foremost, it entirely overlooks the other substantial evidence underscoring petitioner's fault not only for the loss but also showing it received just what the records showed it received. The District Court's opinion set forth numerous facts compelling the conclusion there was mishandling by the petitioner (Appendix, page 20). Petitioner's own records showed it received at least as much cargo, if not more (5,059) tons, than was said to be on the ship, or 5,058 tons (Appendix, pages 14, 15). There was, consequently, substantial evidence showing petitioner received the cargo, which evidence required rebuttal on its part. It failed completely to rebut this evidence whether or not the bills of lading were deemed to have had a prima facie effect as to it. Indeed, the overwhelming evidence of mishandling shows that responsibility for this loss lies right where the District Court placed it, i.e., with the petitioner. It is, therefore, abundantly clear that the Court below properly invoked the rule in *McAllister v. U. S.*, 348 U. S. 19, 20 (1954) and sustained the findings and conclusions of the Trial Judge.

Furthermore, petitioner has not shown the decision conflicts with any decision of this court or otherwise. The opinion in *Herd & Co. v. Krawill Machinery Corp.*, 359 U. S. 297, 301 (1959) was concerned only with the question of whether the *Carriage of Goods by Sea Act* itself or the terms of the bill of lading ". . . evidence any intention to limit the liability of negligent agents of a carrier". It was properly held neither the Act nor the bill of lading provided such an extension since the statute did not expressly limit what would otherwise be the agent's common law liability and, moreover, the agent was not a party to or the beneficiary of the contract of carriage. Obviously,

the present case did not deal with limitation of liability provisions which in turn required strict construction of their terms. On the contrary, the issue was solely one of interpreting the evidentiary effect of a bill of lading issued to cover transportation of goods to a United States port in foreign trade. Such a bill of lading has ". . . effect subject to the provisions of this chapter." 46 U. S. C. A. § 1300. The language of the Act itself sets up the bill of lading as prima facie evidence of receipt. 46 U. S. C. A. § 1303(4). Nothing in this record shows the bills of lading were issued other than in accordance with the requirements of the Act and they were therefore entitled to the weight granted them by statute.

Petitioner's argument that the decision imposes an unjust and intolerable economic burden on contract stevedoring in every American port is absurd. In order for a stevedore to rebut the prima facie effect of a bill of lading all that is needed is proof of an accurate tally of the cargo discharged from the vessel and delivered to the consignee. To require stevedores to hire competent employees in order to check the amount of cargo received by them is hardly unreasonable especially since the cost of hiring the checkers will eventually be borne by the carrier in any event. The District Court found the checkers hired by the stevedore were totally unreliable (Appendix, pages 17, 18, 20). The Court below was therefore surely correct in concluding that the decision of the Trial Court was not clearly erroneous (Appendix, page 23).

CONCLUSION.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES F. YOUNG,
RAYMOND T. LETULLE,
Counsel for Respondents.